Filed 2/11/19 P. v. Allen CA2/6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. CORNELL ARTHUR ALLEN, Defendant and Appellant.	2d Crim. No. B281039 (Super. Ct. No. 2013018051) (Ventura County)

Minutes after shooting a close friend 10 times, appellant Cornell Arthur Allen called 911. He did not say that his life was threatened by the unarmed victim. Instead, he told the dispatcher that the victim "wouldn't leave" and "had sex with my girl." Shortly before the slaying, appellant discovered that his girlfriend was in a sexual and emotional relationship with the victim. She feared appellant, who was angry.

A jury convicted appellant of second degree murder, finding that he used a firearm to commit the crime. (Pen. Code, §§ 187, subd. (a), 12022.53, subd. (d).) He was sentenced to 15 years to

life for the murder plus 25 years to life for using a gun, for a total of 40 years to life in prison.

Appellant contends that the trial court (1) gave inadequate self-defense instructions and (2) should have allowed evidence that the victim was a drug dealer with a criminal record. We conclude that there was no instructional or evidentiary error; further, evidence of appellant's guilt is so overwhelming that any error was harmless. We remand to allow the court to exercise its discretion under a new state law allowing it to strike the gun enhancement. (Pen. Code § 12022.53, subd. (h).)

FACTS

Prosecution's Case

Ventura police went to an apartment on Hurst Avenue at 5:30 a.m. on June 6, 2013, in response to a 911 report of a shooting. They found Stefan Johnson face down on a couch in the living room, bloodstained, not breathing and without a pulse. No weapon was found.

The 911 call came from appellant, who said, "Hey, I just shot an unwelcome person in my home." The dispatcher asked, "You shot them?" Appellant replied, "Yes. I told him to leave, he wouldn't leave. He had sex with my girl. He wouldn't leave." After obtaining the address, the dispatcher asked, "Ok, is the person alive?" Appellant answered, "Ahhh, I doubt it." He identified himself as "Cornell Allen."

A neighbor awakened by multiple gunshots saw appellant leave the apartment. Police were unable to follow appellant using a cell phone signal because he had turned off his device. They used a GPS tracking system to locate his car, parked in Camarillo. In the trunk police found a .45 caliber semiautomatic handgun registered to appellant, with a laser light and an empty

10-round magazine. Testing showed that it was the gun used to shoot Johnson.

The apartment where the crime occurred belonged to Christina Roberts, who was not home at the time of the shooting. However, her daughter Mariah Figueroa and Josiah Guerrero were there, asleep in a back bedroom. Guerrero told police he thought that the victim was asleep on the couch when he was shot. Figueroa identified appellant as someone Roberts dated for five or six years. Appellant had a studio in west Ventura but often stayed overnight at Roberts's apartment, where he contributed to the rent and other expenses.

In March 2013, appellant brought Stefan Johnson to Roberts's apartment, introducing him as his "brother." Johnson began to frequent the apartment, sleeping on the couch about four nights per week. Guerrero observed that appellant and Johnson "seemed like they were brothers. There was much love between them." They never argued, physically fought, or threatened each other. Appellant said that Roberts and Johnson were the two most important people in his life. He did not feel that Johnson posed a threat to anyone's safety at the Hurst Avenue apartment.

Though appellant and Roberts had an intimate relationship, it was not exclusive. Appellant had other girlfriends, and knew that Roberts worked as an escort and sold nude photographs of herself; he never objected and engaged in "threesomes" with her. On a few occasions, appellant, Johnson and Roberts had a threesome.

Johnson and Roberts began an emotional relationship a month before the shooting. Roberts's feelings for Johnson were not a secret; she knew that appellant "wasn't happy about it."

Her relationship with appellant deteriorated. On May 20, 2013, she texted appellant, "I am scared of you!!!" and "Don't wanna be around u," adding "Because your [*sic*] out of control."

Roberts and Johnson began communicating secretly when appellant "started to act crazy," texting each other sentiments of love in May 2013. She wrote that appellant was "such a turn off," that he "scares me," and "gets on my nerves." She denigrated appellant's sexual prowess, texting Johnson on June 4 that appellant "couldn't fuc [*sic*] last night" and "I don't think I can survive this limp dick relationship." Roberts testified that she did not intend for appellant to see the messages. Appellant told her that when she talked in her sleep, she said she loved and wanted Johnson, not appellant.

Appellant wrote Roberts that he had "an issue" with her desire for Johnson adding, "I ain't about to stroll." On June 1, appellant texted her, "Your the bestest ever never going to let you go wanna let you know I adore & appreciate you so much every day yearning for your touch . . . ." (*Sic.*) Despite appellant's adoration, Roberts told him he was no longer welcome in her home because his behavior was radical and abusive. She was upset that he beat his dog with a belt, striking several people in the process, then threw the pet from the living room to the dining room. He also threw an iPad.

The night of June 4, appellant woke Roberts by hitting her in the head with a hard object, which she believes was a gun. He was holding her phone and had viewed her messages to Johnson. He pulled her into the living room, where Johnson was on the couch. Roberts became scared when she saw that appellant had a gun in his waistband. Appellant told Johnson and Roberts he felt "that we didn't like him; we didn't want him in the relationship

anymore . . . ." Roberts opined that appellant was "[n]ot himself," and was angry because he saw her "limp dick" message about him. They assured appellant that they loved him. Johnson remained calm, quieted Roberts, and managed to soothe appellant. After appellant left, Roberts "felt like something bad was going to happen." She texted her nephew that appellant was "crazy" and tried to scare her with a gun.

On June 5, appellant came to Roberts's apartment to collect his clothing. There was no commotion during appellant's visit--no arguing, yelling, or hitting. Johnson asked appellant if he was okay and appellant replied, "I'm cool." Roberts seemed scared afterward, and Guerrero recalled that she talked about changing the door locks. Guerrero knew that Roberts and Johnson liked each other; it "was out in the open" and appellant seemingly accepted it. Roberts testified that she and Johnson "were fearful of [appellant], but not of our lives. No, it didn't seem like that severe to us. We still thought he was our friend."

Guerrero and Figueroa knew that appellant owned a .45 caliber handgun, which he showed them. They saw him carry a gun case back and forth between his car and the apartment; Roberts saw him carry the gun case "all the time." They never saw Johnson with a gun.

Appellant was not at Roberts's apartment the night of June 5. When Guerrero went to bed, only he, Figueroa and Johnson were in the apartment. The front door was locked. Johnson was on the living room couch, watching television. At 3:00 a.m., Figueroa got a glass of water and saw Johnson on the couch, texting and watching television.

Guerrero and Figueroa were awakened by gunshots. Guerrero looked through a hole in the bedroom door and saw

appellant in the living room, near the couch. He had a gun. He left the apartment hurriedly, got in his car and drove away. Police arrived moments later.

Guerrero saw Johnson lying face down, with his upper body on the couch. The television was off. Neither Figueroa nor Guerrero (who described himself as a light sleeper) heard yelling, arguing or fighting noises before or during the gunshots. There were no broken or overturned items and no weapon near Johnson, who looked dead. Figueroa was shocked and terrified when she saw Johnson's body because appellant was on the loose; she texted Roberts that appellant shot and killed Johnson.

The day of the shooting, police issued a press release stating that appellant was the suspect in a murder. One hour later, an attorney called to arrange appellant's surrender. When he was arrested, appellant had no injuries indicating he was in a fight that morning.

Johnson had 16 wounds from 10 bullets. The county pathologist described bullet holes that entered the front of Johnson's body, coming from his left side and exiting on the right. They were not fired from close range because there was no soot or gunpowder on his clothing and no stippling on his skin. Some exit wounds were "shored," meaning they occurred when the skin was pressed against a resistant surface. Several life-threatening chest wounds had shored exit holes in Johnson's back, likely indicating that he was lying against the couch when he was shot. The chest wounds were clustered and would have caused Johnson to be "incapacitated to a severe degree."

One bullet fired in a downward trajectory entered the bridge of Johnson's nose and exited his jaw, causing multiple facial fractures, then reentered at his shoulder. At some point,

Johnson turned away from the shooter. One of the last shots fired entered his back and lacerated his aorta, resulting in death within seconds. Johnson had no scrapes or bruises that might indicate he had been in any kind of altercation.

Police found bullet holes and blood in one corner of the couch, and none on the apartment walls or windows. A glass coffee table near the couch was not broken and nothing was knocked over. A blood spatter expert testified that the victim was on the couch or within one foot of it when he was shot. The largest blood stain was on the seat bottom, then the backrest, with some stains on the armrest.

Appellant's gun ejects cartridges five to six feet, diagonally, while being fired. At the crime scene, the majority were found behind the couch in a group, suggesting that the gun did not move around during the shooting. It is possible to fire 10 rounds in a matter of seconds. The weapon does not leave gunpowder residue on things that are more than three feet away; no gunpowder was found on the victim's shirt.

The Defense

Appellant presented character witnesses who attested to his lack of erectile dysfunction, jealousy, aggression, or controlling or abusive behavior. He was affectionate with his dog and brotherly with Johnson. Over the years, the witnesses never saw appellant and Johnson fight, argue, or threaten each other.

Appellant seemed in fine spirits the day before the shooting. He mentioned that he had just ended his long-time relationship with Roberts and moved out of her apartment because she was sleeping with Johnson. One witness opined that Roberts crossed a line by sleeping with appellant's "family,"

meaning Johnson, and Johnson violated the "bro code" by sharing a woman with a friend.

Appellant arrived at his mother's home at 5:50 a.m. on June 6, just after the shooting. He was uninjured. Family members arranged for him to meet a defense lawyer. His mother refused to speak to police about the circumstances of the shooting.

A forensic pathologist opined that though the victim was shot 10 times (making 16 wounds), it is possible he remained standing during the fusillade despite "brisk bleeding" because his spinal cord and brain were not hit and none of the wounds was immediately incapacitating. The expert conceded that shored wounds from shots fired through the victim's chest indicate he was sitting or lying on the couch, not standing; further, all bullet holes and bloodstains were confined to the couch. The bullet that traveled from Johnson's nose into his shoulder showed a dramatic downward trajectory, meaning that the shooter was firing down into him.

Appellant testified that he is an occupational therapist. He owns a handgun to protect himself and his property. He and Roberts had an open relationship and dated other people. Appellant denied feeling jealous of Roberts, who began working as an escort during their relationship. Appellant introduced Roberts to Johnson, thinking it would be "great" if they all had sex together. Appellant denied feeling jealousy or animosity that Johnson was able to perform sexually in a threesome while appellant was unable to perform and instead acted as cameraman. Appellant denied beating his dog. He also denied being angry that Johnson and Roberts "wanted to engage in an actual relationship."

Appellant was a teenager when he met Johnson; over time, he came to consider and refer to Johnson as his brother. Despite their brotherly relationship, appellant recalled two instances between 2007 and 2009 when Johnson "jumped on me" because they had a disagreement. Each time, appellant was able to overpower or subdue Johnson, without suffering injury or needing a weapon.

After Johnson began spending time at the Hurst Avenue apartment in March 2013, appellant cited three instances in which Johnson "did some more of those sneak attacks. It wasn't like he was trying to fight." If anything, appellant stated, "I thought we were just playing." During this period, appellant accompanied Johnson to "a situation with one of his gang bang buddies up the street, and he had a sock full of rocks in his back pocket." No physical altercation ensued, only "a heated exchange of words." Appellant brought Johnson to social functions with appellant's mother and sisters in 2013, without having any concerns for their safety.

As other examples of Johnson's violent character, appellant recounted that in April or May 2013, Johnson said "he was going to get a gun and rob" a rival gang member but first wanted to make sure that it would not create animosity between the gangs. Appellant has known since the 1990's that Johnson belonged to the Westside Gangster Crips. Johnson told two police officers in 2009 and 2010 that he formerly belonged to that gang, but was no longer active.

In the 1990's, appellant saw Johnson grab a man by the lapels and cuss at him about an unpaid drug debt. Appellant denied being concerned by Johnson's aggression with others.

Johnson knew that appellant always carried a loaded gun to protect himself.

On the nights of June 3 and 4, 2013, appellant heard Roberts talking in her sleep, expressing love for Johnson. Appellant felt like "I was being lied to" and "I was a big dummy" because the two people he most trusted had misrepresented that they only participated in a sexual threesome with appellant, nothing more. He felt betrayed and deceived.

Appellant read the text messages on Roberts's cell phone, to see what she was murmuring about in her sleep. The messages confirmed the emotional relationship between Roberts and Johnson. Appellant denied feeling jealous or angry, just disappointed that he trusted two liars.

Among the messages were nude photos of Roberts. One buttocks photo she sent to Johnson read, "put it right here"; it was the same photo she had sent to appellant, upon which he wrote, "I love my doll. Without you in my life, what am I living for? You and me for eternity. . . . She is the love of my life. She is all that matters." Appellant is not sure if he saw the photo and message to Johnson or her text in which she complained that appellant annoyed her and could not perform sexually.

Appellant did not write Roberts a "Dear John" text or letter. Instead, he woke her early on June 5 by bumping her with his wrist. They went to the living room to conference with Johnson. Appellant calmly informed the couple that he was moving out so they did not have to sneak around behind his back. Appellant testified that he was holding his gun case during this conference, but did not brandish his gun.

He left the apartment, but returned later in the day to retrieve his clothing, without incident. He spoke by phone with

Johnson, who was antagonistic and blamed appellant for introducing him to Roberts. Appellant did not raise his voice during the conversation, even though Johnson said belittling things.

Appellant awoke at 3 a.m. on June 6. He decided to go to Roberts's apartment and collect all of his things--from dishes and towels to electronics and his mattress. He did not want Roberts and Johnson to benefit from all the amenities he provided.

When appellant entered the Hurst Avenue apartment at 4 a.m., he was carrying his gun case. He was not surprised to see Johnson, who was on the couch glaring at appellant. Appellant felt concerned because Johnson "is sneaky." Appellant began to move belongings into his car.

Johnson "[c]ursed, threatened [and] harassed" appellant, who suggested that Johnson go to a donut shop until appellant finished removing his belongings. Johnson threatened to crack appellant's head open and refused to leave, saying that although appellant had a gun, it was not the last one made; appellant interpreted this to mean that Johnson "was going to acquire a gun." Neither man raised his voice, nor did they have a physical altercation. Appellant did not call 911 to report the threats because he did not want Johnson to get in trouble or go to jail.

Instead of leaving the apartment when he heard Johnson's threats, appellant became more determined to stay and remove his belongings, in the face of Johnson's "negative energy." Appellant testified that he took his gun from its case and put it in his pocket "just to meet [Johnson's] aggression with equal and opposite . . . aggression. He was trying to say he was going to shoot me with a gun. I'm not going to let you just shoot me with a gun. I have my own gun." Johnson continued to antagonize

appellant, despite seeing that appellant was armed, calling appellant a "nerd" and "dumb." Appellant did not stop making trips from the apartment to his car and back because "I had to get my things."

Appellant sat down and placed his loaded gun on the glass table between himself and Johnson, with the safety off. This involved "[n]o real thought process" for appellant, who did not intend it as a threat because Johnson had already seen the gun in his pocket. The gun was right in front of appellant, but not within Johnson's reach because "I wouldn't have put it that close to him," appellant stated. Johnson frowned and ridiculed appellant, saying appellant "wasn't going to do anything with the gun . . . and that I should shoot him if I wanted him to leave."

Johnson lunged off the couch for appellant's gun. Their hands "actually met at the gun. My hand was fortunately on the bottom," appellant said. Appellant admitted that he had the gun and Johnson had nothing in his hands when appellant started shooting. Johnson did not fall after the first round, so appellant kept firing as Johnson "remained upright" and again tried to grab appellant's gun. Appellant denied shooting down at Johnson, who was almost six feet tall; he stated that Johnson was not seated with his back against the couch at any point while being shot.

Appellant pulled the trigger "ten times as fast as you can." Johnson turned toward on the couch. Though appellant had not actually seen a gun, he thought Johnson might be reaching for one. Appellant testified that the idea of just pointing the gun at Johnson, without firing it, "didn't cross my mind."

Appellant called 911 "[b]ecause my brother . . . just got shot." He did not mention in the call that Johnson threatened

him. Appellant had bad experiences with police in the past. He decided to leave so that arriving officers would not hurt him. Appellant drove to his mother's home in Camarillo and his family arranged for his surrender.

DISCUSSION

1. Jury Instructions

a. CALCRIM No. 505

Appellant contends that the jury was improperly instructed on self-defense. The court gave CALCRIM No. 505 without objection from either side. Appellant now asserts that the instruction did not inform the jury that he was "acting based on mixed motives, i.e., both the belief [that] he was in imminent danger and anger, rage, jealousy or betrayal, [which] is permissible so long as reasonable fear was the but-for cause of his decision to kill." The argument was forfeited by counsel's failure to object. In any event, we conclude that jury was properly instructed.

CALCRIM No. 505 states that the defendant is not guilty of murder if he (1) "reasonably believed [he] was in imminent danger of being killed or suffering great bodily injury"; (2) "reasonably believed that the immediate use of deadly force was necessary to defend against that danger"; and (3) "used no more force than was reasonably necessary to defend against that danger". Belief in future harm is not sufficient. The defendant's belief in imminent danger must have been reasonable and he must have acted only because of that belief. If the defendant used more force than a reasonable person would believe is necessary in the same situation, the killing is not justified. If the jury found that Johnson threatened or harmed the defendant in the past, it could consider that in deciding whether the

defendant's conduct and beliefs were reasonable. The defendant is entitled to stand his ground and defend himself, even if safety could have been achieved by retreating.

Appellant forfeited his claim regarding CALCRIM No. 505. "'[A] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' [Citation]." (*People v. Jones* (2013) 57 Cal.4th 899, 969.) The court and counsel discussed CALCRIM No. 505 line-by-line. Counsel did not ask to add language that appellant acted out of feelings of jealousy, betrayal or anger. Appellant now contends that the court had a sua sponte duty to instruct that he could use lethal force "based on mixed motives."

Appellant's newly-minted argument belies his testimony, in which he denied that he shot Johnson out of jealousy, betrayal or anger. He testified that he reacted only to Johnson "threatening me and being aggressive and hostile" and did not care if Johnson was having sex with Roberts or usurped appellant's place in her home. He denied that Johnson "stole" his girlfriend, stating that Roberts "is not the type of girl you can actually steal. She is kind of community property." When the prosecutor asked, "you weren't angry at them at all?" (referring to Roberts and the victim), appellant answered, "I just said no, ma'am." He later said, "I was not upset. I was not jealous. There was no confrontation." Defense counsel asked, "Mr. Allen, were you so jealous of Mr. Johnson that you entered the apartment on June 6, 2013, with your handgun and just shot him ten times?" He answered, "No way . . . I did not do that" and, in fact, the idea that "I shot this guy because I was jealous of all the things is just

not true." According to appellant, "I brought the gun in response to his threat to commit violence to my person, to me."

During summation, in keeping with appellant's testimony, defense counsel vigorously denied that appellant acted out of jealousy, betrayal or anger. His theory was that appellant acted solely from fear, telling the jury, "If Stefan Johnson hadn't tried to take Mr. Allen's gun, he would still be alive today; but he did try to take Mr. Allen's gun, and Mr. Allen was justified in firing the weapon until Mr. Johnson no longer presented a danger." Further, "[t]he sum total of the evidence suggests that if anybody was jealous in this situation, if anybody went gangster, if anybody did something ridiculous and put lives in danger, it was [the victim], not Cornell Allen." Finally, "What Mr. Allen was telling you . . . is when he went into that apartment he was trying to calm the situation, not fan the flames" because "[t]he dude doesn't get angry easily; he's a pretty mellow guy." Counsel disparaged the prosecutor's theory that appellant's "jealousy got the best of him and turned him into a homicidal maniac."

Appellant and his counsel did not rely on mixed motives. Seeking full exoneration instead of a lesser degree of homicide, they solely emphasized appellant's belief that Johnson was about to grab a gun and kill appellant. By making a tactical choice at trial to deny that ill feelings motivated his actions, appellant forfeited any claim on appeal that the court should have instructed the jury, sua sponte, that he felt jealousy, betrayal or anger.[1]

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[1] At sentencing, appellant continued to insist, "I shot somebody in self-defense that was trying to take my pistol. I was not jealous." He showed no remorse, telling the court that the

Appellant "could have requested additional instructions with regard to his feeling anger toward [the victim] as well as fear, or with regard to a situation where anger and fear were both causal factors. He did not do so. Nor did he argue to the jury the presence of such dual motivation or feeling. Under such circumstances, his argument on appeal must fail." (*People v. Trevino* (1988) 200 Cal.App.3d 874, 880 (*Trevino*). Accord: *People v. Nguyen* (2015) 61 Cal.4th 1015, 1045 (*Nguyen*).)

Appellant argues that CALCRIM No. 505 incorrectly demands that the jury find he killed Johnson based on fear alone. We disagree. The instruction as written and as given here is correct. Cases interpreting the self-defense instruction have always required that the defendant act solely out of fear. (See *People v. Ye Park* (1882) 62 Cal. 204, 207-208 [defendant "'must have acted under the influence of such fears *alone*'"]; *People v. Adams* (1890) 85 Cal. 231, 235.)

A killer may feel anger or hatred toward the person killed, but his use of deadly force must be "motivated *only* by a reasonable fear and the belief that it is necessary to prevent his death or great bodily injury. The party killing is not precluded from feeling anger or other emotions save and except fear; however, those other emotions cannot be causal factors in his decision to use deadly force. If they are, the homicide cannot be justified on a theory of self-defense. But if the only causation of the killing was the reasonable fear that there was imminent danger of death or great bodily injury, then the use of deadly force in self-defense is proper, regardless of what other emotions the party who kills may have been feeling but not acting upon."

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medical examiner was wrong, the police were wrong, and the jury was wrong to convict him.

(*Trevino*, *supra*, 200 Cal.App.3d at p. 879; *People v. Shade* (1986) 185 Cal.App.3d 711, 716 [rejecting a "meritless" claim that self-defense is available when the defendant acted "out of fear and a desire to harm the attacker"].)

Appellant acknowledges that the statute underpinning the instruction reads, "the party killing must have acted under the influence of such fears alone." (Pen. Code, § 198.) Appellant urges us not to show undue fidelity to Penal Code section 198, enacted in 1872. History weighs against appellant. (See *People v. King* (1978) 22 Cal.3d 12, 26 [Pen. Code, § 198 codifies common law].) Thus, "an instruction which states that the party killing must act under the influence of such fears alone, is a correct statement of the law." (*Trevino*, *supra*, 200 Cal.App.3d at p. 879.)

The Supreme Court's opinion in *Nguyen* confirms that "it was for the jury to decide whether defendant acted *out of fear alone* when he shot and killed Pham." (*Nguyen*, *supra*, 61 Cal.4th at p. 1045, italics added.) The victim, Pham, approached Nguyen's car with gun in hand during a gang war. Nguyen was ready: he had his own gun, gave an eyewitness "'a nice smile,'" "then pointed the gun at Pham and fired, and Pham fired back." (*Id*. at pp. 1030, 1043.) In affirming Nguyen's murder conviction, the Court wrote that the jury "reasonably could have concluded that defendant was not entitled to claim self-defense because, in shooting Pham, he did not act on the basis of fear alone but also on a desire to kill his rival." (*Id*. at p. 1044.) Testimony that Nguyen "held a gun to his chest and smiled . . . as he waited for Pham to approach is sufficient evidence to support a finding by the jury that defendant did not act out of fear alone." (*Id*. at p. 1045.)

Appellant contends that CALCRIM No. 505 incorrectly states that he had to use "no more force than was reasonably necessary" to defend himself. He is mistaken, because "any right of self-defense is limited to the use of such force as is reasonable under the circumstances." (*People v. Pinholster* (1992) 1 Cal.4th 865, 966; *People v. Minifie* (1996) 13 Cal.4th 1055, 1065.) Also, "measures of self-defense cannot continue after the assailant is disabled . . . ." (*People v. Lucas* (1958) 160 Cal.App.2d 305, 310 [after shooting an unarmed victim once, defendant was not justified in firing four more times until he was dead].) Appellant fired ten .45 caliber bullets into someone who was empty-handed and defenseless. The jury could reasonably reject appellant's claim that he used no more force than necessary.

b. CALCRIM No. 571

The jury was instructed on imperfect self-defense. CALCRIM No. 571 states that the defendant acted in imperfect self-defense if (1) "[he] actually believed [he] was in imminent danger of being killed or suffering great bodily injury" and (2) "[he] actually believed that the immediate use of deadly force was necessary to defend against the danger," but (3) "[a]t least one of those beliefs was unreasonable." Defense counsel did not ask the trial court to add any language to the instruction.

Appellant now argues that the court had a duty to instruct that imperfect self-defense applies if appellant had a good faith but mistaken belief that he was using no more force than necessary to defend against Johnson. Appellant forfeited the claim by not asking the court to modify the instruction. (*People v. Jones*, *supra*, 57 Cal.4th at p. 969.) Further, the instructions as a whole adequately cover the topic of excessive force. (*People v. Mayfield* (1997) 14 Cal.4th 668, 777-778.)

Based on our review of the record, there is insufficient evidence to support a finding that appellant acted in the actual but unreasonable belief that he was in imminent danger of death or great bodily injury. (See *People v. Chavez* (2018) 22 Cal.App.5th 663, 690-691.) There is also insufficient evidence to support a finding that appellant used no more force than necessary to defend himself.

Appellant testified that he started shooting when Johnson had nothing in his hands. A table separated them, preventing Johnson from grabbing the gun once appellant picked it up. Expert testimony showed that appellant was at least three feet away from Johnson because there was no gunpowder residue on Johnson's clothing. Even the defense pathologist conceded that Johnson was sitting or lying on the couch when he was shot three times in the chest because the exit wounds were shored. Appellant's testimony that Johnson was on his feet and upright the entire time is not supported by the evidence: there would have been bullet holes in the wall behind Johnson and the exit wounds would not be shored.

Appellant admittedly never saw Johnson with a gun. Appellant testified that the idea of pointing the gun at the unarmed Johnson, without firing it, "didn't cross my mind." Because Johnson was empty-handed, on the couch, and more than three feet away from appellant, no substantial evidence supports a theory that appellant actually believed he was in imminent danger of death or injury. Further, appellant shot the victim 10 times, including multiple times in the back. Under the circumstances, any failure to modify CALCRIM No. 571 is harmless.

c. CALCRIM No. 3472

Appellant did not object when the court instructed the jury with CALCRIM No. 3472, stating "[a] person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force." He now argues that it misstates the law. We again disagree. CALCRIM No. 3472 "is a correct statement of law." (*People v. Eulian* (2016) 247 Cal.App.4th 1324, 1334.) At most, it "might require modification in the rare case in which a defendant intended to provoke only a nondeadly confrontation and the victim responds with deadly force." (*Ibid.*) No such modification of the instruction was needed here.

Appellant testified that he went to the apartment to remove his belongings and did not intend to have a confrontation; however, he also testified that he brought a gun, removed it from its case, carried it in his pocket so that Johnson could see it, then put it on the table out of Johnson's reach. Appellant cannot claim that by brandishing a gun, he was merely trying to provoke a nondeadly confrontation. Further, there is insufficient evidence that the victim responded with deadly force: unlike appellant, Johnson did not pull out a gun. This is not a case in which the parties went to fistfight and the victim raised an object that looked like a gun. (*People v. Ramirez* (2015) 233 Cal.App.4th 940, 945, 948 ["a defendant who assaults his victims with a gun may not set up a valid self-defense claim with evidence he believed the victims also reached for a gun, since they would be justified in meeting deadly force with deadly force"].)

2. Evidence Regarding the Victim's Character

Appellant contends that the court violated his constitutional rights by refusing to permit testimony about the

victim. However, applying "'ordinary rules of evidence do[es] not impermissibly infringe on the accused's right to present a defense.' [Citation.]" (*People v. Blacksher* (2011) 52 Cal.4th 769, 821; *People v. Jones*, *supra*, 57 Cal.4th at p. 957 ["routine application of provisions of the state Evidence Code law does not implicate a criminal defendant's constitutional rights"].) The exclusion of evidence is reviewed for an abuse of discretion. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 827 [excluding as irrelevant evidence of a homicide victim's misdemeanor battery conviction that was unrelated to the defendant].)

Evidence of a crime victim's character is admissible if "[o]ffered by the defendant to prove conduct of the victim in conformity with the character or trait of character." (Evid. Code, § 1103, subd. (a)(1).) When self-defense is raised in a homicide case, evidence of the victim's violent character is admissible, and can be shown by evidence of specific acts against others and reputation evidence. (*People v. Wright* (1985) 39 Cal.3d 576, 587.) "Of course, the trial court may exclude otherwise admissible evidence pursuant to Evidence Code section 352 if admitting the evidence would have confused the issues at trial, unduly consumed time, or been more prejudicial than probative." (*People v. Gutierrez*, *supra*, 45 Cal.4th at pp. 827-828.)

To show his belief that he needed to use lethal force, appellant testified that Johnson previously attacked him, threatened others, and was in a street gang. Appellant stated that he was not concerned by Johnson's aggression with others. Two officers testified that Johnson had been in a street gang. Appellant argues that the court should have allowed introduction of the victim's criminal record and should have allowed him to

testify that Johnson "was a long-time drug dealer who had spent a considerable portion of his adult life in penal institutions."

The court did not abuse its discretion by excluding testimony about the victim's drug convictions. Drug convictions do not show a propensity for violence. (See Pen. Code, § 667.5, subd. (c) [drug crimes are not a "violent felony"].) Johnson's drug dealing is a far cry from the cases appellant cites, *United States v. James* (9th Cir. 1999) 169 F.3d 1210, 1211-1213 [victim boasted of killing a man, raped and hit the defendant, and beat up people in front of her] and *DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1059-1060 [victim regularly hit his wife, held a gun to her head, threatened to kill her the night she shot him, and kept a journal of his frequent violent behavior toward others, which the defendant read].

Appellant sought to offer evidence regarding Johnson's character from Shanisha Colvin, who would have testified that in 1998, Johnson turned her home into "a drug den," hit her, was a gang member, was in and out of custody and had a gun. The court ruled that the testimony was "remote in time and precluded, so the gang and weapon drug house thing is precluded, and being hit by the victim in 1998 is precluded and all the prison and jail stuff is precluded." Appellant asserts that Colvin's testimony would have corroborated his belief that "Johnson was a dangerous criminal with a predisposition toward violence."

Appellant's theory that Johnson was inherently violent because he served time in prison "is rife with speculation," as the trial court found. Appellant offered no proof that Johnson was violent in prison or after being released from prison. Colvin's proposed testimony that Johnson hit her and owned a gun in

1998--15 years before his death--is too remote to show what his character was like in 2013. (See *People v. Gonzales* (1967) 66 Cal.2d 482, 499-500 [a violent reputation seven years before the crime "was too remote to have present probative value."].) There was no offer of proof that appellant knew of Johnson's behavior with Colvin and was affected by it.

Assuming the court erred in excluding evidence, it was harmless because appellant would not have secured a more favorable verdict. (*People v. Watson* (1956) 46 Cal.2d 818, 837.) He "was permitted to testify regarding his past fights with the victim . . . . Defendant was also allowed to describe the details of the altercation that occurred between defendant and the victim on the day [he] was killed. There is no reasonable probability that defendant would have obtained a more favorable outcome had he been permitted to introduce evidence" of the victim's drug dealing or his 1998 assault on a third party. (*People v. Gutierrez*, *supra*, 45 Cal.4th at p. 828.)

Further, "even if the murder victim were the most violent person in the world, that fact would not be relevant if the evidence made it clear that the victim was taken by surprise and shot in the back of the head." (*People v. Hoyos* (2007) 41 Cal.4th 872, 913.) Forensic evidence showed that Johnson was lying on the couch--where all of the bullet holes and blood stains were found--when he was shot. He was unarmed. Residents in the apartment heard no arguing or tussling beforehand, and believed that Johnson was asleep when appellant started shooting. Appellant immediately called 911, but did not say that the victim threatened him. Because the evidence tended to show that the victim was taken by surprise, his purported propensity for violence was not germane.

3. Harmless Error

Appellant claims that instructional and evidentiary errors vitiated his constitutional rights. We have not found error. Even if there was an error, it was "harmless beyond a reasonable doubt." (*Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 011].)

The testimony showed that appellant loved the victim like a brother, bringing him to socialize with appellant's family and friends, without fear or concern that Johnson might harm them. Past run-ins had resulted in minor roughhousing; appellant was able to overpower or subdue Johnson. No one was hurt and in appellant's words, "I thought we were just playing." No one, including appellant, saw Johnson with a gun. Appellant did not curtail his contacts owing to Johnson's gang ties and was admittedly unconcerned by Johnson's past aggression toward others.

Appellant admitted to feeling betrayed and deceived when he learned of Robert's emotional bond with Johnson. Though appellant denigrated Roberts at trial, his text messages to her before the shooting express ardent love. He saw the messages between Johnson and Roberts in which they expressed their mutual love and Roberts disparaged appellant's impotency while extolling Johnson's sexual prowess. A day after reading these messages, appellant killed Johnson.

Appellant denied shooting downward at Johnson; however, even the defense pathologist agreed that the bullet that entered Johnson's nose, exited his jaw and re-entered at his shoulder took a dramatic downward trajectory and was fired by someone standing above Johnson. Appellant denied that Johnson was on the couch during the shooting. The pathologist's report showed,

however, that multiple bullet wounds were "shored" because Johnson was against a resistant surface, the couch, where all the bloodstains and bullet holes were clustered at one end. If Johnson was standing, as appellant claimed, bullet holes would have been found in the walls.

The pathology evidence alone belied appellant's claim that Johnson was "upright" during the entire shooting, trying to grab appellant's gun. All of the bullets struck Johnson's face and upper torso, severing his aorta. He would have been quickly incapacitated by the 10 bullets fired, in appellant's words, "as fast as you can."

Moments after the shooting, appellant called 911 and revealed his true motive: the victim "had sex with my girl." Appellant did not say the victim was armed or threatened appellant, only that "he wouldn't leave." This unfiltered admission of feeling wronged was consistent with appellant's behavior before the shooting, when he abused his dog, woke Roberts by striking her in the head, and displayed a gun while confronting Roberts and Johnson about their no-longer secret love affair. Appellant's 911 call was perfectly coherent, unlike his subsequent claim of self-defense.

Appellant's account of the shooting was not credible. Johnson had no incentive to antagonize appellant, who was supposedly removing his belongings from Roberts's apartment and ceding his love relationship with her to Johnson. Johnson had no weapon. He could see appellant's gun, first in appellant's pocket and then (if appellant is to be believed) on the coffee table. It was not within Johnson's reach because, appellant stated, "I wouldn't have put it that close to him."

Appellant's claim that he shot Johnson in self-defense as part of a struggle "'would have strained the credulity of the most gullible jury.' [Citation]." (*People v. Blanco* (1992) 10 Cal.App.4th 1167, 1176.) There was no miscarriage of justice in this case. (Cal. Const., art. VI, § 13.)

4. Sentencing

When appellant was sentenced, in January 2017, he received a mandatory term of 15 years to life for second degree murder and a mandatory term of 25 years to life for using a firearm. The trial court had no discretion to impose a different sentence, stating "my hands are tied." Effective January 1, 2018, Penal Code section 12022.53 was amended to allow the court to exercise discretion to strike or dismiss a firearm enhancement.[2]

The Attorney General concedes that appellant must have a new sentencing hearing. The record does not contain a clear statement by the trial court that it would not have reduced the sentence even if it had discretion to do so. (*People v. Almanza* (2018) 24 Cal.App.5th 1104, 1110-1111; *People v. Chavez*, *supra*, 22 Cal.App.5th at pp. 712-713.) We remand the matter to allow the trial court to consider whether to exercise its discretion to strike or dismiss the firearm enhancement.

DISPOSITION

Appellant's sentence is conditionally reversed. The matter is remanded to the trial court with directions to exercise its discretion to impose or strike the term of 25 years to life for using

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[2] The statute now reads, "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (Pen. Code, § 12022.53, subd. (h).)

a firearm. (Pen. Code, § 12022.53, subd. (h).) Appellant has the right to assistance of counsel and the right to be present at the remand hearing, unless he chooses to waive his presence. Should the court decline to strike the enhancement, the sentence shall be reinstated and stand affirmed. Should the court order the firearm enhancement stricken, the clerk of the court shall prepare an amended abstract of judgment and forward a certified copy to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P. J.

TANGEMAN, J.

David M. Hirsch, Judge

Superior Court County of Ventura

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, and Roberta L. Davis, Deputy Attorney General, for Plaintiff and Respondent.